IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 05-CV-00329-TCK-SAJ
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	
	)	

THE STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO "DEFENDANTS' MOTION FOR ENTRY OF A CASE MANAGEMENT ORDER"

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COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), by and through counsel, and responds to the "Defendants' Motion for Entry of a Case Management Order" ("Defendants' *Lone Pine*[1] Motion") [DKT #946] as follows:

1. *Lone Pine* case management orders are appropriate, if at all, in mass tort litigation, not in single plaintiff environmental cases such as this case;

2. Defendants' request for entry of a *Lone Pine* case management order is based on the entirely unfounded premise that there is reason to believe that there is no evidence that poultry waste is causing an adverse impact on the environment of the Illinois River Watershed;

3. *Lone Pine* case management orders impermissibly circumvent the Federal Rules of Civil Procedure; and

4. The *Lone Pine* case management order proposed by Defendants, even in comparison to other *Lone Pine* case management orders, is completely unreasonable and unfair.

For these reasons, Defendants' *Lone Pine* Motion should be denied.

I. Introduction

This action has been brought by a single plaintiff, the State, against thirteen defendants for the adverse environmental impacts on the Illinois River Watershed caused by their improper

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[1] *Lone Pine* case management orders derive their name from *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986), an unreported New Jersey trial court decision entered in a mass tort case in which numerous individuals sued 464 defendants for personal injuries and property damage caused by exposure to toxic substances.

poultry waste disposal practices. Prior to this action being brought, as is detailed below, the adverse environmental impacts of improper poultry waste disposal practices on the Illinois River Watershed were already well recognized. In fact, prior to this action being brought a number of Defendants as much as admitted the adverse impacts of poultry waste on the environment.[2] Since the filing of the State's detailed 36-page, 147-paragraph lawsuit against Defendants, the State has provided information and materials supporting its claims that poultry waste is causing an adverse impact on the environment of the Illinois River Watershed in its comprehensive Rule 26(a) disclosures and in its discovery responses.[3] In fact, in addition to the thousands of pages of

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[2] *See* Exhibit 1 (Sept. 10, 2004 Poultry Integrator ad in *Tulsa World* stating: "Our Scenic River Watersheds are examples of environments that include many sources of nutrients that potentially impact the health of the rivers and streams that lie within them. We are prepared to do our part to take care of the poultry portions of the nutrient equation. . ."); Exhibit 2 (Dec. 5, 2004 Poultry Integrator ad in *Tulsa World* stating: "Lately, a good deal of concern has been raised about the effects of excess nutrients in the land and waters of Eastern Oklahoma. So where do these nutrients come from? Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer. . .").

[3] The State's discovery responses include the following: Objections and Responses of State of Oklahoma to Separate Defendant Cobb-Vantress, Inc.'s First Set of Interrogatories and Requests for Production of Documents Propounded to Plaintiffs (5-5-06); Objections and Responses of State of Oklahoma to Separate Defendant Cobb-Vantress, Inc.'s Second Set of Interrogatories Propounded to Plaintiffs (6-15-06); Objections and Responses of State of Oklahoma to Separate Defendant Tyson Foods, Inc.'s First Set of Interrogatories Propounded to Plaintiffs (6-15-06); Objections and Responses of State of Oklahoma to Separate Defendant Tyson Poultry, Inc.'s First Set of Interrogatories Propounded to Plaintiffs (6-15-06); Objections and Responses of State of Oklahoma to Separate Defendant Tyson Chicken, Inc.'s First Set of Interrogatories Propounded to Plaintiffs (6-15-06); Objections and Responses to Interrogatories and Request for Production of Integrator Defendant Simmons Foods, Inc. (6-15-06); Plaintiff's Answers and General Objections to Defendant Cargill's Request for Production to Plaintiffs (10-31-06); Objections and Responses of State of Oklahoma to Separate Defendant Cargill Turkey Production LLC's Amended First Set of Interrogatories and Request for Production Propounded to Plaintiffs (10-31-06); State of Oklahoma's Objections and Responses to Separate Defendant Peterson Farms, Inc.'s First Set of Requests for Production of Documents to Oklahoma Department of Environmental Quality (11-3-06); Responses and Objections of Plaintiff State of Oklahoma to Requests for Production of Documents by Peterson Farms, Inc. Directed to the Oklahoma Water Resources Board (11-3-06); State of Oklahoma's Objections and Responses to Separate Defendant Peterson Farms, Inc.'s First Set of Requests for Production of Documents to

documents it has already produced to Defendants, beginning this month the State is, on an agency by agency basis, making responsive documents available for inspection and copying to all Defendants.

This case, like many cases routinely handled by the federal courts, involves scientific evidence and expert testimony. Discovery in this case can -- and in fact has to date -- proceeded with reference to the Federal Rules of Civil Procedure and the Local Civil Rules. And while a scheduling order or case management order setting forth typical discovery deadlines, expert disclosure deadlines, and motions deadlines has not yet been issued in this case, there is no reason to believe that a simple, but comprehensive and even-handed schedule covering these deadlines cannot be arrived at to efficiently manage this litigation. Rather than proposing such an order, however, Defendants have sought to have a completely unnecessary, unduly complex and extraordinarily one-sided "case management order" entered in this case that would require the State to set forth all the proof in each of its causes of action by January 15, 2007,[4] while not requiring Defendants to meet any deadlines whatsoever. The case management order proposed by Defendants is nothing but a thinly-disguised attempt to force the State to prove every element of its case while the case is in only the early stages of discovery. Simply put, Defendants' proposed case management order is an attempt to use a procedural vehicle (a case management order) to achieve a substantive end (possible dismissal of claims). Such an order is unprecedented in a case such as this, and the Defendants' *Lone Pine* Motion should be denied.

Oklahoma Conservation Commission (11-3-06); and Responses and Objections of Plaintiff State of Oklahoma to Requests for Production of Documents by Peterson Farms, Inc. Directed to the Oklahoma Scenic River Commission (11-3-06).

[4] The case management order proposed by Defendants seeks to have all evidence and experts' opinions pertaining to the first three causes of action in the complaint produced in its entirety by December 15, 2006, *see* Defendants' Proposed Order, p. 1, and the evidence and experts' opinions for the remaining seven causes of action produced by January 15, 2007, *see* Defendants' Proposed Order, p. 5.

II. Argument

A. Entry of a *Lone Pine* case management order is not appropriate for and not warranted in this case

Defendants' arguments that a *Lone Pine* case management order should be used in this case are wholly without merit. As explained below, contrary to Defendants' representations, *Lone Pine* case management orders (when used at all) are particular to mass tort cases, not single plaintiff environmental pollution cases like this one. Additionally, assuming arguendo that *Lone Pine* case management orders were used in single plaintiff environmental pollution cases (which they are not), this case would not be a candidate for such an order given the publicly available evidence and the disclosures that the State has already made. Furthermore, *Lone Pine* case management orders are problematic because they circumvent the Federal Rules of Civil Procedure. And finally, even in comparison to other *Lone Pine* case management orders, the *Lone Pine* case management order proposed by Defendants is completely unreasonable.

1. To the extent they are used at all, *Lone Pine* case management orders are used in mass tort litigation, not in single plaintiff environmental cases such as this case

Defendants would have this Court believe that *Lone Pine* case management orders are commonly used in single-plaintiff environmental pollution litigation. However, the fact of the matter is that *Lone Pine* case management orders are a mass tort case management device. As plainly explained by the Fifth Circuit Court of Appeals: "*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (emphasis added). The instant action is indisputably not a mass tort case; it does not involve tens, hundreds or thousands of plaintiffs asserting numerous personal injury claims and personal property damage claims.

Simply put, a *Lone Pine* case management order is inappropriate and unprecedented in an action such as this one.

As noted above, *Lone Pine* case management orders derived their name from *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986), a mass tort case in which a New Jersey trial court, in an unreported decision, entered a case management order. The case involved numerous individuals who had sued 464 defendants for personal injuries and property damage caused by exposure to toxic substances. *See Lone Pine*, 1986 WL 637507. The personal injuries alleged were varied and included allergies, skin rashes and similar ailments, while the property damage claims alleged that real estate values fell as a result of the release of toxic materials. *Lone Pine,* 1986 WL 637507, *1. Following the issuance of an EPA report that limited the area impacted by the toxins, the Court required the plaintiffs to provide affidavits setting forth their exposure, reports of medical experts confirming personal injuries and causation, and reports demonstrating diminution in property value. *Lone Pine,* 1986 WL 637507, *1-2. Unlike *Lone Pine*, the instant case does not claim varied, speculative injuries suffered by numerous individuals. Furthermore, the total number of parties involved in the instant case is a miniscule fraction of the number of defendants involved in *Lone Pine*. Finally, the studies and information available do not bring the State's claim in this case into doubt, but rather support those claims. *See, infra,* Section II.A.2.

Likewise, the other cases cited by Defendants as "support" for the proposition that a *Lone Pine* case management order would be appropriate in this case involve circumstances easily distinguishable from the instant case. For example, *In re Jobe Concrete Products, Inc.*, 2001 WL 1555656, *1 (Tex. App. Dec. 6, 2001), involved over 500 plaintiffs suing a concrete operation for personal injuries, emotional injuries, and damages to personal property from noise

and the emission of chemicals, dust and other substances. In *Acuna*, approximately 1,600 plaintiffs brought claims for personal injuries and property damage against over 100 uranium mining and processing companies. *See Acuna*, 200 F.3d at 337-40. The case *Grant v. E.I. DuPont De Nemours & Co.*, 1993 WL 146634, *1 (E.D.N.C. Feb. 17, 1993), involved 12 separate actions and 22 plaintiffs alleging personal injuries, emotion distress and property damage. And *In re Love Canal Actions*, 547 N.Y.S.2d 174, 175-79 (1989), involved over 800 plaintiffs alleging personal injuries. Simply put each of the cases the Defendants rely upon is a mass tort case. They involve individual tort claims brought by multitudes of individual claimants, each having different exposures and injuries. The courts in these cases were faced with the task of separating legitimate claims of exposure and injury from others that appeared speculative. In stark contrast to these cases, this case involves a very manageable number of parties, and a manageable number of claims that involve injury to a finite area, the Illinois River Watershed. This Court is not faced with the task of having to separate legitimate claims from a number of allegedly suspicious claims; the claims here are plainly not speculative.

Defendants do not cite a single case involving the types of claims brought in this case that has utilized a *Lone Pine* case management order. Notably, the Manual for Complex Litigation includes a section regarding case management of environmental actions, and specifically addresses actions brought under CERCLA. *See* Manual for Complex Litigation, § 34.21 (4th ed. 2006). However, although the Manual for Complex Litigation describes the need for case management in such cases, *Lone Pine* case management orders are not even addressed in this discussion.

Finally, it is important to correct the assertion made by Defendants that *Lone Pine* case management orders are "regularly" entered. As evidenced by the dearth of cases cited by

Defendants in their motion, it is safe to conclude that *Lone Pine* orders are not commonly used.[5] In fact, recent surveys of the use of *Lone Pine* orders cite a mere handful of cases which have implemented such orders. *See e.g.,* James P. Muehlberger and Boyd S. Hoekel, *An Overview of Lone Pine Orders in Toxic Tort Litigation,* 71 Def. Couns. J. 366 (2004). Simply put, *Lone Pine* orders are a rare exception, not the norm. Cases involving multiple parties and sophisticated scientific issues are common in the federal courts. For many years prior to *Lone Pine*, and for many years since, courts have managed these cases using the Rules of Civil Procedure and traditional case management orders. As discussed below, this is due to the fact that the Rules of Civil Procedure provide perfectly adequate mechanisms for dealing with expert testimony.

2. Defendants' request for entry of a *Lone Pine* case management order is based on the entirely unfounded premise that there is reason to believe that there is not evidence that poultry waste is causing an adverse impact on the environment of the Illinois River Watershed

Entry of *Lone Pine* case management orders are generally entered in mass tort litigation where there is reason to question whether there exists evidence supporting one or more of the mass tort plaintiffs' claims -- *i.e.,* whether the claims are speculative. Putting aside for the moment the fact that the instant case is not a mass tort case, the fact of the matter is that there is absolutely no reason to believe that there does not exist evidence supporting the State's claim. In fact, there exists plenty of publicly-available evidence supporting the State's claim that poultry

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[5] For examples of instances where *Lone Pine* case management orders have not been entered, *see, e.g., Blaylock v. Cargill, Inc.*, 8:05CV372, D. Neb., Dec. 14, 2005 Order (denying motion by Cargill for entry of a *Lone Pine* case management order in histoplasmosis cases) (attached as Exhibit 3); *Hall v. Pfizer, Inc.*, 6:05-cv-667-Orl-31DAB, M.D. Fla., July 25, 2005 Endorsed Order (denying motion by Pfizer for entry of *Lone Pine* case management order in single plaintiff, single defendant Viagra case) (attached as Exhibit 4); *Kahn v. CSX Transportation, Inc.*, 03-72652, E.D. Mich., Mar. 11, 2004 Minute Entry (denying motion by CSX for entry of *Lone Pine* case management order in property damage case brought by 17 residents) (attached as Exhibit 5).

waste causes an adverse impact on the environment generally and an adverse impact on the environment of the Illinois River Watershed in particular.[6] By way of example and without limitation:

- A September 30, 2005 report prepared by the Office of the Secretary of the Environment entitled "Coordinated Watershed Restoration and Protection Strategy for Oklahoma's Impaired Scenic Rivers" states: "[u]nfortunately, all of the water quality improvements realized at baseflow conditions are promptly erased when rainfall in the watersheds causes runoff of phosphorus exposed to the elements. The most significant source of this phosphorus is surface-applied poultry litter." Exhibit 7 at p. 3. The report continues: "[b]ecause the majority of the phosphorus and other pollutants of concern, such as bacteria and sediment, stem from nonpoint source runoff, efforts to restore the Scenic Rivers are obstructed by the lack of a similar commitment on the part of the poultry integrator companies that operate in Scenic River watersheds to address the single largest contributor of nonpoint source pollution -- surplus poultry litter generated at their farms." Exhibit 7 at p. 7.
- A May 2004 report prepared by the EPA entitled "Risk Assessment Evaluation for Concentrated Feeding Operations" states that pollutants released from concentrated animal feeding operations are transported by "surface runoff, air transport and redeposition, and groundwater flow. Nutrients, pathogenic organisms, hormones and metals may easily reach waterbodies via these means." Exhibit 8 at section 1, p. 4. The report also states that "[m]icroorganisms associated with manure may present a significant risk to health. The population of several known pathogens may be quite high

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[6] Many examples of such evidence appear on the State's Rule 26(a) initial disclosure. *See* Exhibit 6.

in manure. Runoff from land application sites may carry large numbers of organisms into streams. Recreational use of the streams may then bring people into direct exposure to large numbers of potentially pathogenic microorganisms. Several disease outbreaks have been associated with manure contamination of water or food that has been contacted by manure." Exhibit 8 at section 4, p. 24.

- A 2004 article by Schroeder, et al. entitled "Rainfall Timing and Poultry Litter Application Rate Effects on Phosphorus Loss in Surface Runoff" states: "Over the past decade, control of nonpoint-source pollution has come to the forefront in efforts to improve water quality in the United States and elsewhere. The principal components of agricultural nonpoint-source pollution are sediment, bacteria, N, and P. Of these, P is the nutrient most commonly associated with accelerated eutrophication in freshwater systems because these systems are usually P limited. . . . A strong relationship exists between the rate of manure application and the concentration of total phosphorus (TP), dissolved reactive phosphorus (DRP), and particulate P in runoff." Exhibit 9 at p. 2201.
- A 1998 doctoral thesis submitted by David Gade entitled "An Investigation of the Sources and Transport of Nonpoint Source Nutrients in the Illinois River Basin in Oklahoma and Arkansas" states: "[s]ubbasins with the greatest densities of poultry houses, and hence high estimated soil phosphorus levels, generally delivered the greatest quantities of nutrients to the Illinois River and its tributaries." Exhibit 10 at p. 233.
- A 2003 report by the United States Geological Survey entitled "Phosphorus Concentrations, Loads, and Yields in the Illinois River Basin, Arkansas and Oklahoma, 1997-2001" states that "[t]he annual average (1997-2001) phosphorus load entering Lake

Tenkiller was about 577,000 pounds per year. More than 86 percent of the phosphorus load was transported to the lake by runoff." Exhibit 11 at p. 21.

- An October 1, 2005 document prepared by the Arkansas Natural Resources Commission entitled "Arkansas NPS Management Program: 2006-2010 Update" states: "[t]he Illinois River Watershed portion of segment 3J contains 152 stream miles in which 125.1 stream miles were monitored at eight permanent monitoring stations. An additional 8.1 stream miles were evaluated for a total 133.2 stream miles monitored in the Illinois River watershed. Nonpoint source impacts affecting waters in this segment are primarily from pasture land that is also used for application of poultry litter as fertilizer." Exhibit 12 at p. 10.1 (entire document available on-line at www.commetricsconsulting.com/draftplan.html). The report further states that "[p]ollutants of concern within this hydrologic unit area include: turbidity, siltation, nutrients and pathogens. Some of these pollutants cause some water bodies to not fully meet their designated uses (ADEQ, 2005)." Exhibit 12 at p. 10.5.
- An August 1996 report prepared by Oklahoma State University entitled "Basin-Wide Pollution Inventory for the Illinois River Comprehensive Basin Management Program -- Final Report" estimates that non-point sources other than background account for 66 percent of the phosphorus loading to the Illinois River basin and that ". . . the pasture/range land use accounts for 95 percent of the total nonpoint source phosphorus loading to the [Illinois River] basin." Exhibit 13 at pp. 96-97. The report concludes that "[l]ong-term reductions of phosphorus loading can only be accomplished by exporting animal manure from the basin." Exhibit 13 at p. 96.

3. *Lone Pine* case management orders impermissibly circumvent the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure provide established, proven procedures for managing discovery and exchange of expert information in this case. The mechanisms provided by the Federal Rules of Civil Procedure are more than adequate for handling the instant case, and demonstrate that a *Lone Pine* order is completely unnecessary. Defendants' proposed *Lone Pine* case management order is simply an unnecessary and unfair attempt to circumvent the Federal Rules of Civil Procedure and prejudice the State, which is demonstrated by the unbelievably burdensome and complex format of the proposed case management order.

Defendants' proposed case management order seeks extensive information regarding (1) the State's allegations in its First Amended Complaint, (2) expert opinion and testimony, and (3) all evidence supporting the State's claims. As to this first category (the State's allegations in its First Amended Complaint), Federal Rule of Civil Procedure 26(a)(1) requires that the State provide to the other side information about individuals likely to have discoverable information that the State may use to support its claims as well as a copy of or a description by category and location of documents in its possession, custody or control that the State may use to support its claims. As noted above, the State has provided such information and descriptions to Defendants. Further, Fed. R. Civ. P. 30 (depositions), 33 (interrogatories) and 34 (requests for production) provide additional devices for the discovery of information pertaining to the State's claims. To date, Defendants have made active use of interrogatories and requests for production. *See, supra,* Footnote 3. There is no reason to believe that continued use of these discovery devices within the bounds of the Federal and Local Rules will not provide the Defendants the means to gather in any orderly fashion all the information about the State's claims to which they are legitimately entitled. There is simply no need for a *Lone Pine* case management order to be substituted for these tried and true discovery devices.

As to the second category (expert opinion and testimony), Fed. R. Civ. P. 26(a)(2) provides for expert disclosures and reports to be provided pursuant to Court direction, but not less than 90 days before the trial date. The State anticipates that the Court will enter reasonable expert disclosure deadlines for both parties, and the State fully intends to comply with those deadlines. The Defendants' proposed *Lone Pine* case management order, on the other hand, is nothing but an effort to do an end-run on expert discovery: it would require unilateral and premature disclosure of the State's expert opinions and the obligations of disclosure of expert opinion are not reciprocal. The proposed case management order would require the State to provide all information regarding experts within the next two and a half months, while providing no schedule for Defendants to disclose any expert information. The fact of the matter is that fact discovery is still on-going, and expert disclosures do not typically occur until the conclusion of fact discovery. This aspect of the proposed case management order is completely one-sided and an obvious effort to obtain an unfair strategic advantage by Defendants. Were that not bad enough, the proposed case management order would also unfairly require splicing the expert information into the multitude of subsections proposed in the proposed case management order. Such a requirement would be completely inefficient and unreasonable. In short, as there can be no good faith assertion that the State's case is speculative, there is no reason to accelerate the disclosure of expert information.

As to the third category (all evidence supporting the State's claims), Defendants seek to require the State to set forth proof for every single element of every cause of action in this case by January 15, 2007. Defendants seek to have the State set forth detailed facts, witnesses' names and expert opinions in detail. The proposed case management order essentially turns case management upside down. Under the proposed case management order, Defendants would have

the State not only lay out its entire order of proof for the other side before trial, but also prove its entire case before the close of discovery. In addition, Defendants seek to have this Court enter summary judgment as a penalty if any of the voluminous requirements in their proposed case management order are not answered adequately. In short, Defendants are attempting to use a procedural vehicle (a case management order) to achieve a substantive end (dismissal of claims and summary judgment in their favor). A case management order is an inappropriate mechanism under which to seek dismissal as it lacks the procedural safeguards of an actual motion for summary judgment or dismissal. If Defendants truly believe that this case lacks credibility -- a belief which in and of itself would lack credibility -- they are entitled to file motions to dismiss and motions for summary judgment pursuant to the Federal Rules of Civil Procedure. Attempting to obtain a dismissal or summary judgment outside of these rules, and without a proper analysis of summary judgment by the Court is simply improper and beyond the purpose of a case management order.

Simply put, it appears that Defendants' objective with their proposed case management order is to unilaterally obtain series after series of extensive, detailed information from the State. However, Defendants seem to have confused a case management order with discovery. A case management order is not meant to be a discovery tool itself (let alone a discovery tool for one party only), but rather is to schedule and organize trial preparation for both parties. Defendants already served extensive discovery in this case, to which Plaintiff is responding. As noted above, the State has already provided Defendants its Rule 26(a) disclosures and responses to scores of discovery requests, and is in the process of providing responses to scores more. Defendants' assertion that the proposed case management order is necessary because the State has "vigorously and stubbornly refused to produce evidence legally required to support their claims"

is simply not true. Defendants are thoroughly pursuing discovery and should not be permitted to use a case management order to force the State to produce yet another series of information outside the discovery permitted by the Federal Rules of Civil Procedure.

Lone Pine case management orders like the one proposed by Defendants have been criticized as attempts to circumvent the Rules of Civil Procedure, and are viewed as providing an unfair advantage to defendants in litigation. Even the articles cited by Defendants in their motion make it clear that *Lone Pine* case management orders are beneficial to defendants only, providing circumvention of and shortcuts to procedural rules. For example, Defendants' *Lone Pine* Motion cites heavily to an article by William A. Ruskin, which clearly illustrates that *Lone Pine* case management orders are beneficial to defendants only. *See* Defendants' *Lone Pine* Motion, pp. 6 & 9. Mr. Ruskin unabashedly states that his article "discusses the benefits of the [*Lone Pine*] alternative for defendants in mass tort litigation." William A. Ruskin, *Prove it or Lose it: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 Am. J. Trial Advoc. 599, 601 (2003). Mr. Ruskin goes on to explain that "*Lone Pine* orders offer defendants in mass tort actions several distinct advantages," and that "[f]rom the defendants' perspective there are several key advantages to attacking causation through a *Lone Pine* order rather than a summary judgment motion." *Id.* at 603 (emphasis added). Even the name of Mr. Ruskin's article -- *Defending Against Mass Tort Claims Using Lone Pine Orders* -- demonstrates that *Lone Pine* case management orders are a defense-favored strategic device rather than a fair, objective case management tool. As one observer aptly noted:

> [C]omplex litigation does not afford a court free reign to disregard mandated procedural rules under the guise of inherent case management authority. When courts depart from mandated rules and use devices such as *Lone Pine* orders, they diminish the legitimacy of the legal process by adding uncertainty and inconsistency to an otherwise regimented system. Furthermore, courts that use

> *Lone Pine* orders negate the checks and balances and safeguards that are inherent in properly promulgated rules of procedure.

John T. Burnett, *Lone Pine Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 J. Land Use & Envtl. Law 53, 87 (1998).

4. The *Lone Pine* case management order proposed by Defendants, even in comparison to other *Lone Pine* case management orders, is completely unreasonable and unfair

Even if this case were a mass tort case (which it is not), and even if it involved an unwieldy number of parties (which it does not), and even if *Lone Pine* orders did not circumvent the Federal Rules of Civil Procedure in an unfair manner (which they do), Defendants' proposed case management order is exponentially more complex, detailed, and burdensome than *Lone Pine* case management orders used by other courts. In the cases cited by Defendants in support of their proposed case management order, the courts entered orders that required disclosure of the basic facts regarding alleged exposure to toxins (time, location, duration), and causation opinions linking toxins to the injuries. Most of the courts in the cases cited by Defendants articulated what the plaintiffs were required to provide under the *Lone Pine* case management orders by means of a limited number of specified points. *See e.g., Lone Pine*, 1986 WL 637507, *1-2 (requiring plaintiffs to provide facts regarding personal exposure to toxins and expert reports regarding injury and causation, and information about location of property and report regarding diminution of property value); *In re Jobe Concrete Products*, 2001 WL 1555656, *1 (requiring affidavits from plaintiffs stating their circumstances of exposure, with approximate areas of specificity); *Acuna*, 200 F.3d at 338 (requiring affidavits setting forth approximately six areas of information pertaining to exposure for each plaintiff and illnesses suffered by plaintiffs). In stark contrast, Defendants' proposed case management order contains approximately forty different sections and one hundred and sixty subsections. Each section and subsection requests

that specific information, data, testimony or expert opinions be disclosed.[7] In addition to the limited expert opinions and causation evidence typically required by *Lone Pine* orders, Defendants' proposed case management order seeks identity of witnesses, of data, and various other factual information that is far above and beyond the limited information required in other *Lone Pine* case management orders.

One of the most remarkable thing about Defendants' proposed case management order is the fact that it includes approximately two hundred specified requests for information from the State, but does not require Defendants to disclose one bit of information, or to meet any deadlines whatsoever.[8] Defendants' proposed case management order would do nothing but complicate the ongoing discovery in this case and place an unfair burden on the State, while requiring Defendants to do absolutely nothing. Furthermore, the Proposed Order, p. 1, proposes that the possible penalties for failure to comply with these extraordinarily burdensome and unnecessary requirements would be dismissal of the State's claims -- a wholly unwarranted result. In fact, it appears that under the proposed case management order, Defendants would not even be required to file a formal motion for summary judgment in order to reap the benefit of a possible dismissal.

B. This Court should order the parties to meet and confer to establish an appropriate scheduling / case management order that comports with the letter and the spirit of the Federal Rules of Civil Procedure

The State does not disagree that this case needs a case management / scheduling order. However, the order should not be the extraordinarily one-sided, unwarranted, inappropriate and

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[7] Requiring the State to disclose "all evidence" and "the identity of each expert" is simply improper at this stage in the proceedings.

[8] For example, under the proposed order Defendants are not required to disclose (let alone in precisely the same manner and level of detail and by the same deadlines) all of the information and supporting evidence pertaining to their affirmative defenses.

unnecessary "case management order" being proposed by Defendants (which in reality is not even a case management order). Rather, the State respectfully suggests that this Court should order the two sides to meet and confer to attempt to arrive at a simple but comprehensive even-handed case management / scheduling order that is consistent with the letter and the spirit of the Federal Rules of Civil Procedure and that sets forth realistic and fair discovery deadlines, expert disclosure deadlines, and motions deadlines. Further, it should be made clear that *Lone Pine* case management orders are inappropriate to a case such as this one.

III. Conclusion

WHEREFORE, premises considered, the State respectfully requests that this Court reject Defendants' Proposed Order in its entirety and deny Defendants' Motion for Entry of a Case Management Order.

Respectfully Submitted,

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